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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 183

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Petitioners,

v.

DETROIT, TOLEDO & IRONTON RAILROAD, a Delaware Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUBJECT INDEX

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2-4
Statutes Involved	5
Statement	5-11
Court Decision	9-11
Reasons for Granting the Writ	11-15
Conclusion	15

INDEX TO CASES CITED

Brotherhood of Railroad Trainmen v. Howard, 343 U. S. 768	15
N. L. R. B. v. Highland Park Mfg. Co., 341 U. S. 321	11
Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192-209	15
Tumey v. State of Ohio, 273 U. S. 510	14
United Railway Operating Crafts, et al. v. The Pennsylvania R. R. Co., 212 F. 2nd 938	13
U. R. O. C. et al. v. Northern Pacific Ry. Co. 208 F. 2nd 135	13
28 U. S. C. 1254(1)	2
28 U. S. C. A. Sections 1331, 1332, 1337	2, 3, 5, 6, 11
45 U. S. C. A. 151	2, 6, 7, 11
45 U. S. C. A. 151a	4, 7
45 U. S. C. A. 152 Fourth	3, 5
45 U. S. C. A. 152 Fifth	5, 12

Page

45 U. S. C. A. 152 Eleventh.....3, 4, 5, 8, 9, 11, 12
45 U. S. C. A. 153..... 3, 5
45 U. S. C. A. 153 Second..... 2, 8
45 U. S. C. A. 153 (f).....4, 10, 13, 14
45 U. S. C. A. 153 (i)..... 3, 8

INDEX TO APPENDIX

Cause Argued and Submitted..... 1a
Judgment 1a
Opinion 2a-12a
Order Denying Rehearing..... 12a

INDEX TO PERTINENT PROVISIONS OF THE CONSTITUTION AND STATUTES INVOLVED

Pertinent Provisions of the Constitution and Statutes Involved 13a-22a

Article V Amendment to Constitution of the United States 13a

Title 28 U. S. C. A.:
Sec. 1331 ..... 13a
Sec. 1332 ..... 13a
Sec 1337 ..... 13a

Railway Labor Act:—Title 45 U. S. C. A.:

Sec. 151 ..... 14a
Fifth 14a
Sixth 14a

Page

Sec. 151(a)—General Purposes..... 15a

Sec. 152—General Duties 15a-18a
First 15a
Third 15a
Fourth 16a
Fifth 16a
Eleventh 16a-18a
(a) 16a-17a
(b) 17a
(c) 17a-18a
(d) 18a

Sec. 153. National Board of Adjustment—Grievances—Interpretation of Agreements 18a-22a

First 18a-22a
(a) 18a
(b) 19a
(c) 19a
(f) 19a-20a
(g) 20a
(h) 20a
(i) 20a-21a
(j) 21a
(m) 21a
(n) 21a
(o) 21a
(p) 21a-22a

Second 22a

IN THE

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No. .....

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Petitioners,

v.

DETROIT, TOLEDO & IRONTON RAILROAD, a Delaware Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 4, 1955.

OPINION BELOW

The opinion of the Court of Appeals is reported in 221 F. 2d 736, (*infra* pp. 2a-12a). The opinion of the District Court is reported at 116 F. Supp. 949 (E. D. Mich.) and is found in (R. 60A).

JURISDICTION

The judgment of the Court of Appeals (App., ~~10a~~ 1a) was entered on March 4, 1955. Judge Allen wrote a dissenting opinion. A timely petition for rehearing was filed by the petitioners, and this petition was denied on March 31, 1955. Judge Allen felt rehearing should be granted. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court under the authority of 28 U. S. C. A. Sections 1331 or 1337 has jurisdiction to entertain petitioners' complaint seeking to prevent their discharge from employment where they claim that their rights under the Fifth Amendment (due process clause) have been violated as well as their rights under the Railway Labor Act, 45 U. S. C. A. 151, *et seq.*, by a decision of a System Board of Adjustments provided for by 45 U. S. C. A. 153 Second, which Board, composed of two members, one from the carrier, and the other representing the union hostile to the petitioners and to the rival union in which they hold membership, and which in its endeavor to have petitioners discharged from employment, prosecutes and presides at a hearing in reference to its own complaint lodged against petitioners.

2. Whether a dispute between a union representative and an employee of a railroad carrier is such a dispute cognizable under the provisions of 45 U. S. C. A. Sec. 153 to be determined only by an Adjustment Board.

3. Whether the District Court under the authority of 28 U. S. C. A. Sections 1331 or 1337 has jurisdiction to entertain petitioners' complaint in which they seek to prevent their discharge from employment and the enforcement of a union shop agreement presumably entered into under authority of 45 U. S. C. A. 152 Eleventh; which agreement they allege in their complaint as being invald because of provisions unauthorized therein; namely—that the labor organization chosen to represent them as employees of a railroad carrier, under the provisions of 45 U. S. C. A. Section 152 Fourth, shall initiate proceedings against them, seeking their discharge from employment, and that as to the employee desiring a hearing, his discharge shall be suspended until a final decision of a two-man board and for ten days thereafter.

4. Where Congress by the provision of the Railway Labor Act, Sections 151(a) and 152 ~~Fourth~~ Eighth of 45 U. S. C. A., has treated the term "conditions of employment" and the term "working conditions" separately, and as to the former term, has forbidden contracts, nullified those entered into prior to the Act, and as to the latter term, has provided by the provision of Sec. 153 (i) for an Adjustment Board to resolve disputes between employee and employer only, not resolved in conference—Can such Adjustment Board assume jurisdiction to resolve a controversy between a union representative and an employee in reference to union security as a condition of "continued" employment under the Amendment to the Act, 45 U. S. C. A. 152 Eleventh?

5. Where Congress by the provisions of the Railway Labor Act has refrained from defining a union "national in scope" but by the provisions of 45 U. S. C. A. 151 (a) and 152 Fourth has provided for the right of employees to organize, join unions of their own choosing, has forbidden limitation upon their freedom of association, has provided for their complete independence in matters of self organization, and by Section 151 Fifth has provided "nor shall the jurisdiction or powers of such employee organization be regarded as in any way limited or defined by the provisions of this Act;" can an adjustment board whose own jurisdiction is limited to disputes between employee and employer only, assume jurisdiction to define or limit the geographical jurisdiction of an employee organization as to whether it is organized as national in scope, or is that subject left for judicial determination in a request for declaratory judgment in a controversy where the determination of such status becomes important?

6. Has the Court misapplied a federal statute, namely, 45 U. S. C. A. 153 (f) to the case at bar, by holding that the qualification necessary for an organization to be recognized as a union national in scope in order for members of such union to be entitled to the exemption from joining the bargaining representative's union under 45 U. S. C. A. 152 Eleventh (c) as employees of a railway carrier, can only be accomplished by such union participating in the selection of members of the National Adjustment Board?

STATUTES INVOLVED

The constitutional provision and pertinent statutes which are listed below are printed in the appendix herein (Appendix 13a-22a).

Fifth Amendment to Constitution (*infra* 13a).
28 U. S. C. A. 1331 (*infra* 13a).
28 U. S. C. A. 1332 (*infra* 13a).
28 U. S. C. A. 1337 (*infra* 13a).
45 U. S. C. A. 151 Fifth—Railway Labor Act (*infra* 14a).
45 U. S. C. A. 151 (a) Railway Labor Act (*infra* 15a).
45 U. S. C. A. 152 Fourth, Fifth, Eleventh (*infra* 16a).
45 U. S. C. A. 153 (*infra* 18a).

STATEMENT

Petitioners for themselves and others as a class action in their complaint in the District Court for the Eastern Division of Michigan alleged:

That they are resident of Michigan and employees of the defendant Railroad (a Delaware corporation) doing business in Michigan as a railroad carrier engaged in interstate commerce,[1] and sought an injunction to prevent their

[1] Original jurisdiction of the District Court was invoked in their complaint under the provisions of 28 U. S. C. A. 1331, being a civil action involving upwards of $3,000.00, exclusive of interest and costs, and arises under the Constitution (5th Amendment) and the Railway Labor Act 45 U. S. C. A. 151, *et seq.*, and under 28 U. S. C. A. 1332 because of diversity of citizenship, being a civil action involving more than $3,000.00, the defendant railroad carrier being a Delaware corporation, the defendant Brotherhood being a labor organization with

(Continued on next page)

immiment discharge from employment and for a declaratory judgment (R. 36A).[2-3] They alleged that the notice of discharge resulted from a direct proceeding initiated against them by their own Statutory Representative, the defendant Brotherhood of Railway Trainmen seeking their discharge who wrongfully claimed that they were not in compliance with a union shop agreement. That they requested a hearing in regard to the Brotherhood's request that they be discharged from employment. The Brotherhood sat in judgment at the hearing in reference to its own complaint against them, as a member of a congressionally ordained System Board of Adjustments. This Board was composed of two men; viz—one from the Carrier and the other from the Brotherhood, namely, its chairman who sought their discharge on behalf of the Brotherhood, and who at the hearing also prosecuted the Brotherhood's own complaint against them; that they did not and could not receive a fair and impartial hearing before a partial and biased Board as that Board was thus constituted. All of this was done without propriety or sanc-

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(Continued from preceding page)

principal offices in Cleveland, Ohio, whereas all petitioners are residents of Michigan; jurisdiction was further invoked under 28 U. S. C. A. 1337, this being a civil action arising under an Act of Congress regulating commerce, namely the Railroad Labor Act, 45 U. S. C. A. 151, *et seq.*

[2] References to "R" refer to the appendix of plaintiff-appellants as filed in the Court of Appeals.

[3] The defendant Brotherhood was allowed to intervene in the proceedings, and filed a motion to dismiss the complaint. Petitioners were permitted by the Court to file an Amended Complaint wherein it made both the Brotherhood and the Carrier parties defendant. It was stipulated by the parties that the Motion to Dismiss shall apply to the Amended Complaint without the necessity of the Brotherhood filing a new motion (R. 60a). All references to petitioners' complaint refer to the Amended Complaint (R. 38a).

tion of law in administering the provisions of the Railroad Labor Act; that the controversy did not grow out of a dispute between employee and employer, nor did it involve working conditions as that term is treated in the Act, nor was it a jurisdictional dispute between two rival unions.

Petitioners claimed that their rights—loss of their jobs—have been violated under the due process clause of the Fifth Amendment to the Constitution (R. 44a), as well as their rights granted to them as employees under the provisions of the Railway Labor Act, a federal statute regulating commerce, 45 U. S. C. A. 151 *et seq.* (*infra* 14a).

Petitioners alleged that the Brotherhood, their Union Representative, is a rival labor organization hostile to them and to the union in which they hold membership (R. 45a-46a), viz., United Railway Operating Crafts (herein referred to as U. R. O. C.) which is a union national in scope with local unions affiliated with it on sixty-one railroads in thirty-eight states; (R. 39a) that instead of representing them, as well as all other employees of their craft or class, the Brotherhood discriminated against them, acted arbitrarily towards them; that it was biased because petitioners were members of a rival organization. That the Brotherhood's motive and conduct was to prevent employees from organizing or joining employee associations of their own choosing with safety (fear of losing their jobs) as granted to employees by Congress. Section 151(a) Section 152 Fourth, but instead it was creating a monopoly of workers to be recruited only from its own membership (R. 43a)[4]

[4] In the Brotherhood's motion to intervene (R. 13a), the Brotherhood states that it is the real party in interest—that it has a vital interest in the outcome of this litigation inasmuch as it and its membership will be "materially and substantially" affected by its right to insist upon the enforcement of the agreement and the discharge of the plaintiffs.

Petitioners alleged that the proceeding initiated against them by the Brotherhood stems from an invalid union shop agreement, the provisions of which and in its effect, practice, and administration goes beyond the authority in the union shop amendment to the Act. 45 U. S. C. A. 152 Eleventh. That under the provisions of said paragraph Eleventh of the Act, petitioners' right not to become a member of the Representative Organization (Brotherhood in this case) is expressly sanctioned if the employee holds or acquires membership in a union national in scope admitting to membership employees of the craft and class designated. The petitioners allege that by their membership in U. R. O. C. that they have satisfied the requirement of the Amendment in not becoming members of the Brotherhood (R. 41a).

Petitioners further stated that the System Board of Adjustments set up in the union shop agreement was not a board sanctioned by the Amendment to the Act, *Sec. 152 Eleventh,* (*infra* 16a) and that it had no authority to hear a controversy between a union and an employee, nor to determine the geographical status of a rival union as to whether it was organized as national in scope. That such Board, set up under authority of Sec. 153 Second was limited under Sec. 153 First (i) to hear only disputes between employee and employer. That the agreement without authority of the Act provided that the Brotherhood, chosen to represent the employees, should initiate proceedings seeking the discharge of the employee. That the agreement by its provisions also anticipated an unfavorable decision for the employee by providing therein that if the employee notifies the Board that he desires a hearing his discharge shall be suspended until the final decision of said Board and for a period of ten days thereafter (R. 52a).

In addition to injunctive relief, the petitioners prayed that the court find that the agreement that they alleged in their complaint was invalid (R. 41a), be decreed to be unenforceable or inoperative; that the proceedings before the Board were irregular, arbitrary, against public policy, and its findings unenforceable. Petitioners also prayed for a declaratory judgment determining that United Railway Operating Crafts, in which they hold membership, is a labor organization National in scope, organized in accordance with the Act admitting to membership employees of the craft and class referred to in the Act and that the court hold that neither they nor any other employee can be discharged solely because of membership in said union (46a).

Court Decision

The Court dismissed petitioners' complaint for want of jurisdiction upon a motion to dismiss filed by the Brotherhood, that the petitioners' complaint was not justiciable by a Court.

In a divided opinion, the Court of Appeals affirmed the judgment of the District Court upon the opinion of the District Judge. Judge Allen of the Court of Appeals wrote a dissenting opinion (*infra* 2a-12a).

The majority opinion expressly stated "It is conceded that U. R. O. C., in which petitioners hold membership, is organized in accordance with the Act" * * * "The Railway Labor Act in providing for union shop agreements in *45 U. S. C. A. Sec. 152 Eleventh* (*infra* 16a) nevertheless makes no provision for ascertaining whether or not a labor organization is national in scope; nor is any procedure provided in said section whereby employees of a union may avail themselves of the exception to the necessity of

joining the bargaining organization on the ground that their union is national in scope." The Court in adopting the opinion of the District Judge stated, "There is as we have indicated a natural conflict of interest between U. R. O. C. and the labor representatives on the Board."

Notwithstanding the above findings, the Court of Appeals in adopting the opinion of the District Court, the petitioners feel, misapplied the provisions of the Act by invoking the provisions of 45 U. S. C. A. Sec. 153 (f), (*infra* 19a) the subject of which is not involved in the petitioners' complaint in this suit, and which provision has to do solely with another type of controversy between different parties, and under different circumstances, namely, "In the event that a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board * * *"

Without any sanction from Congress, the majority in its opinion, nevertheless, held that a labor organization desirous of qualifying for the exception to the union shop requirement must also participate in the adjustment board machinery before it can obtain the required stamp of approval as an organization "national in scope." That the plaintiffs (petitioners) should have insisted that U. R. O. C. so participate or should have protected their interests by joining the Brotherhood.

Paradoxically, the majority in its opinion also stated, "a labor organization cannot of course resort to the specific administrative machinery relating to the selection of members of the National Adjustment Board, for the limited purpose of establishing that its members are entitled to the exception to the union shop requirement."

In the dissenting opinion, Judge Allen rejected the theory of the majority and stated, "That to apply the technical administrative provisions of Section 153 First, (*infra* 18a) relating to unions and management to the simple but all important guarantees of Section 152 Eleventh, on behalf of employees, nullifies the Congressional intent and constitutes judicial legislation." That the question in this case is not how the National Adjustment Board shall be constituted or whether U. R. O. C. shall have a member on the Board "The question here is whether the appellants (petitioners) shall be deprived of their livelihood. Their right not to be deprived of it if U. R. O. C. comes within the classification of Section 152 Eleventh (c) (*infra* 17a) is a valid statutory right falling within the general jurisdiction of the federal court under Title 28, Section 1331," * * * to be protected by the examination of a court free from bias or conflict in interest and safeguarded by judicial procedure * * *. That the District Court should hear the evidence, construe the meaning of the phrases "national in scope," "organized in accordance with the Act" and determine whether U. R. O. C. comes within that classification." Judge Allen cited *N. L. R. B. v. Highland Park Mfg. Co.*, 341 U. S. 321 to show that it was appropriate for a federal court to determine whether a labor organization is national in scope.

REASONS FOR GRANTING THE WRIT

The case raises important questions of wide import under the Constitution and laws of United States and Railway Labor Act, 45 U. S. C. A. 151 *et seq.* Its resolution will have immediate importance far beyond the particular facts and the parties involved, for it involves the plans hopes and aspirations of a great many people

throughout the country. There have been many scores of railroad men throughout the country who have lost their jobs, it is contended, because of the misapplication of Sec. 152 Eleventh, and there are several thousand whose security in their jobs is uncertain. Some of these employees of railroads have worked for carriers over thirty years; their seniority and other benefits being wiped away, and as to others, their jobs are in jeopardy. Their right as employees of railroad carriers, and as provided by Congress in the Railway Labor Act, Sec. 151a-152 Fourth, to organize and join without limitation labor unions of their own choosing, have been frustrated by having courts relegate them to an Adjustment Board or to a System Adjustment Board, the labor members of which boards are rival and hostile to the union in which many of these employees hold membership. The inevitable result is the loss of their jobs.

This action stems from the construction given to 45 U. S. C. A. Sec. 152 Eleventh (*infra* 16a) which section was enacted January 10, 1951 (union shop amendment). The petitioners as well as several thousand others throughout the land hold membership in labor organizations national in scope organized in accordance with the Act. By the provisions of said section they are not required to join the bargaining representative's union. Congress has not defined the term "National in Scope" but Congress has said in Section 151 Fifth (*infra* 14a) "nor shall the jurisdiction or powers of such employee organization (organized by their voluntary action) be in any way regarded as limited or defined by the provisions of this Act * * *"

The Congressional gift to employees to organize, join unions, and to bargain with their employers through representatives of their choosing, has been utilized in practice as a Trojan Horse, a gift destructive of the independence of the donees.

The Court in the Ninth Circuit has stated that their cause is not justiciable and is only within the jurisdiction of the National Adjustment Board.[5] The National Adjustment Board, on the other hand, has stated, "A decision in this case depends upon whether United Railroad Operating Crafts is a labor organization 'National in Scope.' So far as we are advised, there has been no final interpretation of the meaning of the words 'National in Scope' as used in the amendment to the Railroad Labor Act, by a tribunal of competent jurisdiction." And, then without benefit of a definition, holds against the employee, thusly, "Assuming the most liberal interpretation of the words 'National in Scope' in favor of the contention of fireman Hanson, it does not appear that United Railroad Operating Crafts meets the most meager requirements to qualify as such at this time."[6]

The Court in the Seventh Circuit was in conflict with the Sixth Circuit in principle but not in decision by misapplying 45 U. S. C. A. 153 First (f) and then holding that to be qualified as a union national in scope the union must participate in the Adjustment Board machinery, although an organization could have such status without so participating. That inasmuch as U. R. O. C. did not seek to participate in the selection of labor members of the Board, the matter can only be left for a decision of the Adjustment Board or System Board as the case may be.[7]

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[5] *U.R.O.C., et al. v. Northern Pacific Ry. Co.*, 208 F. 2nd 135.

[6] Exhibit A attached to petition for rehearing in the certified record in this cause.

[7] *United Railway Operating Crafts, et al. v. The Pennsylvania R. R. Co.*, 212 F. 2nd 938.

In the case at bar, the petitioners had a hearing before the System Adjustment Board,[8] resulting from a complaint initiated against them by a member of said board seeking their discharge. The court in a divided opinion, while recognizing the hostility or natural conflict in interest between a member of said board and the petitioners and their union, applied the provisions of 45 U. S. C. A. 153 (f) (*infra* 19a) to issues not involved in the case. Judge Allen in the dissenting opinion felt that the majority in its opinion by applying "the provisions of Sec. 153 to the simple but all important guarantees of Section 152 Eleventh on behalf of the employees, nullifies the Congressional intent and constitutes judicial legislation." And, by such holding, the Court has left a decision of a board with a member thereof "a representative of the adverse hostile appellee union which is endeavoring to have these appellants discharged from employment. Such a result contravenes the general rule that if the judge has a bias or conflict of interest, proceedings over which he presides are invalid. *Tumey v. State of Ohio*, 273 U. S. 510, 522."

The petitioners feel that their rights under the due process clause of the Fifth Amendment to the Constitution have been violated; that their rights under the Railway Labor Act have been abridged.

Petitioners respectfully submit that, contrary to the opinion of the Court below in the case at bar:

1. No dispute was involved with respect to any rival union desiring to participate in the selection of members to the National Adjustment Board or in its activities as would be required under Sec. 153 (f) in such a case.

2. No dispute was involved under a petition of United Railroad Operating Crafts (as distinguished from your

[8] Unlike the case at bar there was no hearing before an administrative board in the cases that reached the Seventh and Ninth Circuit Courts.

petitioners) as to whether it was or was not national in scope.

3. No dispute was involved falling within any of the provisions of Section 153 which covers the administrative procedure applicable to certain types of disputes specified therein and between different parties.

4. No dispute was involved concerning the interpretation or construction of a union shop agreement.

5. Nothing in Section 152 Eleventh authorizes any labor organization to initiate proceedings against an employee for the purpose of determining whether an employee is or is not in compliance with a union shop agreement.

6. That Section 153 (i) (*infra* 20a) makes no provision for a dispute between a labor organization and an employee.[9]

CONCLUSION

It is therefore respectfully requested that the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[9] In *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192-209, the Court said, Sec. 3 First (i) which provides for reference to the Adjustment Board "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements, makes no reference to disputes between employees and their representatives." See *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768.

APPENDIX

APPENDIX

CAUSE ARGUED AND SUBMITTED

(December 6, 1954—Before: Allen, McAllister and Stewart, JJ.)

This cause is argued by William A. Rhodes for appellants and by Theodore Sachs for appellees and submitted to the Court.

JUDGMENT

(Filed March 4, 1955)

Appeal from the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be and the same is hereby affirmed.

The above is an exact true copy as is set forth in the Certified Record on Petition for Certiorari, as submitted by the Clerk of the Court of Appeals.

OPINION

(Filed March 4, 1955)

No. 12143

UNITED STATES COURT OF APPEALS
For the Sixth Circuit

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Plaintiffs-Appellants,
v.
DETROIT, TOLEDO & IRONTON RAILROAD COMPANY, a Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN,
Defendants-Appellees.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided March 4, 1955.

Before ALLEN, McALLISTER, and STEWART, Circuit Judges.

McALLISTER, Circuit Judge. Appellants, who are members of the United Railroad Operating Crafts, known as the UROC, filed their complaint against the Detroit, Toledo & Ironton Railroad Company for an injunction to restrain the company from discharging them from employment for having failed to comply with union membership in the Brotherhood of Railroad Trainmen. The complaint was filed after the Brotherhood had submitted charges to the company, setting forth that appellants had not become members of the Brotherhood and had not paid their dues to such organization. The complaint further set forth that a hearing was held before a "system adjustment board," consisting of a representative of the railroad and

a member of the Brotherhood, which was provided for in a union shop agreement entered into between the railroad company and the Brotherhood; that appellants appeared on the hearing in answer to the charges; and that they were afterward notified that their seniority and employment would terminate on September 22, 1952. In appellants' suit in the district court, the Brotherhood intervened as a defendant and filed a motion to dismiss the complaint. The district court granted the Brotherhood's motion on the ground that, because of the provisions of the Railway Labor Act, 45 U. S. C. A., Sections 151, et seq., the issues were within the province of the National Railway Adjustment Board, and the court had no jurisdiction to consider the matter. *Pigott* v. *Detroit, T. & I. R. Co.*, 116 F. Supp. 949.

On appeal, it is contended that the district court was in error in holding that it was without jurisdiction to consider and decide the matters in issue; and this contention is based upon the district court's interpretation of the provisions of the Railway Labor Act and its application to the facts in this case.

The Brotherhood is admittedly the bargaining representative of certain crafts and classes of employees of the railway company, as authorized by the provisions of the Railway Labor Act, 45 U. S. C. A., Section 152, Fourth. As such bargaining representative, the Brotherhood entered into a union shop agreement with the railroad, pursuant to Section 152, Eleventh, of the Act, in which it was provided that all employees of the crafts and classes represented by the Brotherhood should become members of the Brotherhood within sixty days after their employment or after the effective date of the agreement, whichever was later. Appellants are members of the crafts and classes represented by the Brotherhood in the union shop agreement.

The Act excepts from the necessity of joining the bargaining representatives (in this case, the Brotherhood) all those employees who belong to another labor organization, "national in scope" and "organized in accordance with

this chapter." 45 U. S. C. A., Section 152, Eleventh (c). Accordingly, as required by the statute, the union shop agreement also excepted from the necessity of joining the Brotherhood all those employees who belonged to another labor organization "national in scope" and "organized in accordance with" the Act.

Appellants, as members of the UROC, claimed that under the Act and under the union shop agreement executed pursuant thereto, they are exempted from joining the Brotherhood for the reason that they are members of another union "national in scope" and "organized in accordance with the Act." It is conceded that the UROC is organized in accordance with the Act. The "system adjustment board," established by the union's shop agreement to adjudicate disputes arising thereunder, held, however, that appellants had acknowledged their nonmembership in the Brotherhood but had failed to present evidence establishing that their membership in the UROC was membership in a labor organization national in scope. It was in the face of this holding that appellants filed their complaint to forestall their imminent discharge; petitioned the court for a declaratory judgment that the UROC was a labor organization "national in scope"; and further asked that the railroad be enjoined from discharging them from employment, all of which was denied by the district court when it dismissed the complaint.

The Railway Labor Act, in providing for union shop agreements in 45 U. S. C. A., Section 152, Eleventh, nevertheless, makes no provision for ascertaining whether or not a labor organization is national in scope; nor is any procedure provided in said section whereby employees of a union may avail themselves of the exception to joining the bargaining organization on the ground that their union is national in scope. The section of the Railway Labor Act relating to union shop agreements, in making an exception to the necessity of joining the bargaining organization, sets forth only that members of a labor organization are excepted from joining a bargaining organization if their organization is "national in

scope." How, then, is it to be ascertained whether such an organization is national in scope?

Appellants say that they will be deprived of due process of law if they are bound by the decision of the "system adjustment board" provided for in the union shop agreement in this case, since their rights would thus be determined by a tribunal composed of two members—one, from the railway, and the other, from the Brotherhood, which is the party here seeking to bring about their discharge from employment; and it is submitted that in accordance with due process of law, appellants' rights are not to be determined by persons who are partial or biased, or where a conflict of interest makes such persons incompetent.

Is there no fair way, then, under the provisions of the Railway Labor Act, by which it can be determined, in an impartial and equitable manner, whether a labor organization is "national in scope"? The district court found such a method under the provisions of Section 153 of the Act. These provisions, however, relate to the establishment of the National Railroad Adjustment Board, the manner in which the members thereof are to be selected, and the decision of disputes as to the right of any national labor organization to participate in the selection of the labor members of the Board. It is provided in this section of the Act [45 U. S. C. A., Section 153, First (a)] that half of the members of the National Railroad Adjustment Board shall be selected by the carriers, and half, "by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of Section 152 of this title."

As above stated in the Act, the labor organizations entitled to select members of the National Railroad Adjustment Board are limited to those "national in scope." The Act further provides, in case a dispute arises as to the right of any labor organization to participate in the selection and designation of the labor members of the National Railroad Adjustment Board, that the Secretary of Labor shall investigate the claim of the labor organization con-

tending that it has a right so to participate, and if such claim, in the judgment of the Secretary of Labor, has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice, the Mediation Board shall request those national labor organizations theretofore duly qualified to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. "Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding." 45 U. S. C. A., Section 153, First (f).

There is no question that the above procedure provided by the Act insures a fair determination, by a three-member board, of the question as to the right of a labor organization to participate in the selection of the labor members of the National Railroad Adjustment Board. But appellants contend that Section 153, First (f), of the Railway Labor Act provides machinery for determining whether a labor organization is "national in scope" in order that it be qualified to participate in selecting members of the National Railroad Adjustment Board, and that such section has no application to the determination whether a labor organization is "national in scope" within the union shop provision of the Act set forth in Section 152, Eleventh. Appellants declare that the UROC is not interested in selecting members of the National Railroad Adjustment Board, and that such union is not obliged to assert the right to participate in such selection to secure a determination from the three-man Board provided for in that Section, as to whether it is a labor organization "national in scope," in order to entitle it to the exemption from joining the Brotherhood as a labor organization "national in scope" under the union shop section of the Act.

But we are of the opinion that appellants are not denied due process of law where there is the right to secure a fair determination whether their labor organization is "national in scope" available to them, or, rather, to such labor organization, even though the administrative machinery for making such determination must be availed of in proceedings under the Act to qualify for the right to select members of the National Railroad Adjustment Board. The concept whether a labor organization is "national in scope" is well suited to administrative definition under the Railway Labor Act by the National Railroad Adjustment Board, a body familiar with the industry. As above mentioned, there is available under the Act administrative machinery, if its use were desired by the UROC, to determine whether that labor organization is "national in scope"; and the determination by the three-man Board, in a proceeding to determine whether the UROC were "national in scope" and thereby had the right to select members of the National Railroad Adjustment Board, would be conclusive, and have a prospective, universal application, not only with respect to selection of labor members of the Board, but also to the provision exempting such labor organizations from the necessity of joining the bargaining representative. *United Railroad Operating Crafts* v. *Pennsylvania R. Co.*, 212 F. (2d) 938 (C. A. 7). As Judge Levin observed in his able and comprehensive opinion in the district court in this case, a labor organization cannot, of course, resort to the specific administrative machinery relating to the selection of members of the National Railroad Adjustment Board for the limited purpose of establishing that its members are entitled to the exception to the union shop requirement. The effect of the provisions for participation by a union in the Adjustment Board machinery, as stated by Judge Levin, "is that a labor organization, desirous of qualifying for the exception to the union shop requirement, must also participate in the adjustment board machinery before it can obtain the required stamp of approval" as an organization "national in scope." In providing for the selection of labor members of the National Railroad Adjustment Board by

labor organizations "national in scope," Congress provided machinery to determine, in case of dispute, whether such a union be "national in scope." In enacting the subsequent amendment to the Act providing that members of a union, national in scope, are exempt from joining another union which had been selected as bargaining representative, there seems evident the intention on the part of Congress that before a union were entitled to be exempt from the necessity of joining the bargaining representative as an organization "national in scope," it must have participated in the Adjustment Board machinery, and have been there recognized as an organization "national in scope." As stated by Judge Levin, it is only by insisting on such participation that a clear and concrete standard is available to guide all interested parties as to the status of a labor organization, and further: "This result is consonant with the intention of the drafters of the union shop amendment that a labor organization shall not be entitled to enlist employees on the basis of the privileged standing accorded to qualified unions in Section 152, Eleventh until it has assumed its fair share of the burdens and responsibilities attendant upon the administration of the Act" including the considerable financial burden required of the labor organizations participating in the administrative machinery of the Railway Labor Act. "Thus, a labor organization must exert itself, at least to the extent of participation in the adjustment board machinery, before it is so entitled." *Pigott* v. *Detroit, T. & I. R. Co.*, 116 F. Supp. 949 (D. C. Mich.).

The question whether appellants' union, the UROC, was "national in scope," within the meaning of the union shop agreement entered into between the Brotherhood and the railroad, was an issue solely within the province of the National Railroad Adjustment Board, or, in this case, the system board of adjustment, established in accordance with Section 153, Second, of the Act. *United Railroad Operating Crafts* v. *Pennsylvania R. Co., supra; United Railroad Operating Crafts* v. *Northern Pacific Ry. Co.*, 208 F. (2d) 135 (C. A. 9); *Alabaugh* v. *B. & O. Railroad Co.*, 125 F. Supp. 401 (D. C. Md.). In *Bohnen* v. *B. & O.*

Chicago Terminal R. Co. & Brotherhood of Railway Trainmen, 125 F. Supp. 463 (D. C. Ind.), where the Brotherhood and the railroad had entered into a union shop agreement requiring employees to become members of the Brotherhood or other unions, national in scope and organized in accordance with the Railway Labor Act, members of the UROC brought suit to enjoin their threatened discharge by the railroad, based on the ground that they did not belong to the Brotherhood. In holding that the district court had no jurisdiction in the case and that the controversy was entirely within the province of the Board, Judge Swygert said: "When the provisions of the agreement are taken into consideration it seems clear that what the plaintiffs are complaining about is conduct of the Brotherhood and the defendant railroad which they say is not in accordance with the terms of the contract. In other words, it is a dispute growing out of an interpretation or application of an agreement concerning working conditions and therefore is the kind of dispute which must be brought before Adjustment Board under Section 3 of the Act for settlement." To the same effect see *Johns* v. *Baltimore & O. R. Co.*, 118 F. Supp. 317 (D. C. Ill.); *United Railroad Operating Crafts* v. *Wyer*, 115 F. Supp. 359 (D. C. N. Y.), affirmed, 205 F. (2d) 153 (C. A. 2); *Alabaugh* v. *B. & O. Railroad Co., supra.*

In conclusion, it may be said that "it is apparent from the scheme of the Act that an organization held qualified . . . to participate in the selection of Board members would also be held national in scope within the meaning of the union shop amendment." *United Railroad Operating Crafts* v. *Pennsylvania R. Co.*, 212 F. (2d) 938, 943 (C. A. 7). "With the benefit of such a standard, no employee need risk his seniority or his job by having to join a labor organization first and then to wait for an adjustment board or court proceeding before the status of such rival labor organization is adjudicated." *Pigott* v. *Detroit, T. & I. R. Co.*, 116 F. Supp. 949, 956 (D. C. Mich.). "There is, as we have indicated, a natural conflict of interest between UROC and the labor representatives on the

Board. However, there is available under the Act administrative machinery to obviate the possible disadvantage to which that conflict might subject these employees, if its use were desired by UROC." *United Railroad Operating Crafts* v. *Pennsylvania R. Co., supra,* page 942. "In the instant case, the plaintiffs should either have insisted that UROC establish its status in the prescribed fashion or have protected their interests by joining the Brotherhood." *Pigott* v. *Detroit, T. & I. R. Co., supra* page 956. "UROC has never sought the right to participate in the selection of labor members of the Board. Therefore, its status, whether national in scope or not, has never been so determined. Under the circumstances, the matter can only be left to the Adjustment Board, or a System Board as the case may be, in each dispute involving that question." *United Railroad Operating Crafts* v. *Pennsylvania R. Co., supra,* page 943.

With respect to various arguments of counsel for appellants attacking the constitutionality of the provisions of the Railway Labor Act and procedures thereunder, we are of the view that no substantial constitutional question is presented on this appeal. See *Shelly* v. *Kraemer,* 334 U. S. 1, 8; *Duignan* v. *United Etates,* 274 U. S. 195, 200; *Johns* v. *Baltimore & O. R. Co.,* 118 F. Supp. 317, 322 (D. C. Ill.). Moreover, there was no abuse of discretion on the part of the district court in refusing to grant a motion to raise the question of the unconstitutionality of the statute and to request the convening of a three-judge court to determine such question, where the motion was not made until after the court had reached its decision.

In accordance with the foregoing, the judgment of the district court dismissing the complaint for want of jurisdiction is affirmed upon the opinion of Judge Levin.

ALLEN, Circuit Judge, dissenting. I regret that I cannot agree with my colleagues. I see no answer to the proposition that the majority opinion recognizes and the judgment leaves in effect the decision of a system adjustment board, a two member tribunal, one member representing the railway, and one member a representative of

the adverse and hostile appellee union which is endeavoring to have these appellants discharged from their employment. Such a result contravenes the general rule that if the judge has a bias or conflict of interest, proceedings over which he presides are invalid. *Tumey* v. *State of Ohio,* 273 U. S. 510, 522.

45 U. S. Code, Section 153, First, provides administrative machinery for adjusting relations between the unions and management. It does not provide for the right of the employee to retain his job if he is a member of a labor organization "national in scope" and "organized in accordance with the Act." That situation is covered in Section 152, Eleventh. To apply the technical administrative provisions of Section 153, First, relating to unions and management, to the simple but all-important guaranties of Section 152, Eleventh, on behalf of the employee, nullifies the Congressional intent and constitutes judicial legislation.

The question here is not how the National Railroad Adjustment Board shall be constituted nor whether the appellant union shall have a representative on the National Railroad Adjustment Board which is the general subject of Section 153, First. The question here is whether appellants shall be deprived of their livelihood. Their right not to be deprived of it if UROC comes within the classification of Section 152, Eleventh (c) is a valid statutory right falling within the general jurisdiction of the federal court under title 28, Section 1331. The case certainly arises under a law of the United States. It is a right which should be protected by the examination of a court free from bias or conflict in interest and safeguarded by judicial procedure.

It has recently been held that a federal court is empowered to determine whether a labor organization is "a national or international organization." An administrative tribunal had held that the organization in question did not fall within the purview of the statutory phrase, but the Supreme Court affirmed a federal court decision which determined otherwise. *N. L. R. B.* v. *Highland Park Mfg.*

Co., 341 U. S. 322. It is equally appropriate for a federal court to determine whether a labor organization is "national in scope.' The expertise demanded in one case is no greater than in the other. If Congress intended the geographic adjectives to have other than their ordinary civil meaning it would have given them a special meaning by definition. *N. L. R. B.* v. *Highland Park Mfg. Co., supra.*

The District Court should hear the evidence, construe the meaning of the statutory phrases "national in scope," and "organized in accordance with the Act," and determine whether UROC comes within that classification.

ORDER DENYING REHEARING

(Filed March 31, 1955)

After due consideration of the matter set forth in appellants' petition for rehearing, it is ordered, adjudged, and decreed that the petition for rehearing be and the same is hereby denied.

Judge Allen thinks the petition for rehearing should be allowed.

The above is an exact true copy as is set forth in the Certified Record on Petition for Certiorari, as submitted by the Clerk of the Court of Appeals.

Provisions of

CONSTITUTION

and

STATUTES

PERTINENT PROVISIONS OF THE CONSTITUTION AND STATUTES INVOLVED

ARTICLE V Amendment to Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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TITLE 28 U. S. C. A. Sec. 1331

The district courts shall have original jurisdiction of all civil actions wherein the mater in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States.

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TITLE 28 U. S. C. A. Sec. 1332

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3000.00, exclusive of interest and costs, and is between:

(1) Citizens of different States;

• • • • •

TITLE 28 U. S. C. A. Sec. 1337

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

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RAILWAY LABOR ACT:—TITLE 45 U. S. C. A. Sections 151 et seq.

Sec. 151. When used in this Act and for the purposes of this Act—

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, **nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this act** or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization or corporation designated either by a carrier or group of carriers or by its or their employees to act for it or them.

* * * * *

Emphasis supplied.

Sec. 151(a)—GENERAL PURPOSES—

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein: (2) **to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization;** (3) **to provide for the complete independence of carriers and of employees in the matter of self-organization;** (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

Sec. 152—GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Third. Representatives, for the purposes of this act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Emphasis supplied.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. **No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions** * * *.

Fifth. No carrier, it officers, or agents shall require any person **seeking employment** to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

* * * * *

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the be-

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Emphasis supplied.

ginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this

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Emphasis supplied.

Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* **That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.**

(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended.

Sec. 153. NATIONAL BOARD OF ADJUSTMENT—GRIEVANCES—INTERPRETATION OF AGREEMENTS

First. There is hereby established a Board, to be known as the "National Railroad Adjustment Board," the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been **or may be organized** in accordance with the provisions of section 2 of this Act.

Emphasis supplied.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor orzanizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participa-

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Emphasis supplied.

tion and decide whether or not it was organized in accordance with section 2 hereof and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the

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Emphasis supplied.

disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

* * * * *

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum to which he is entitled under the award on or before a day named.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in

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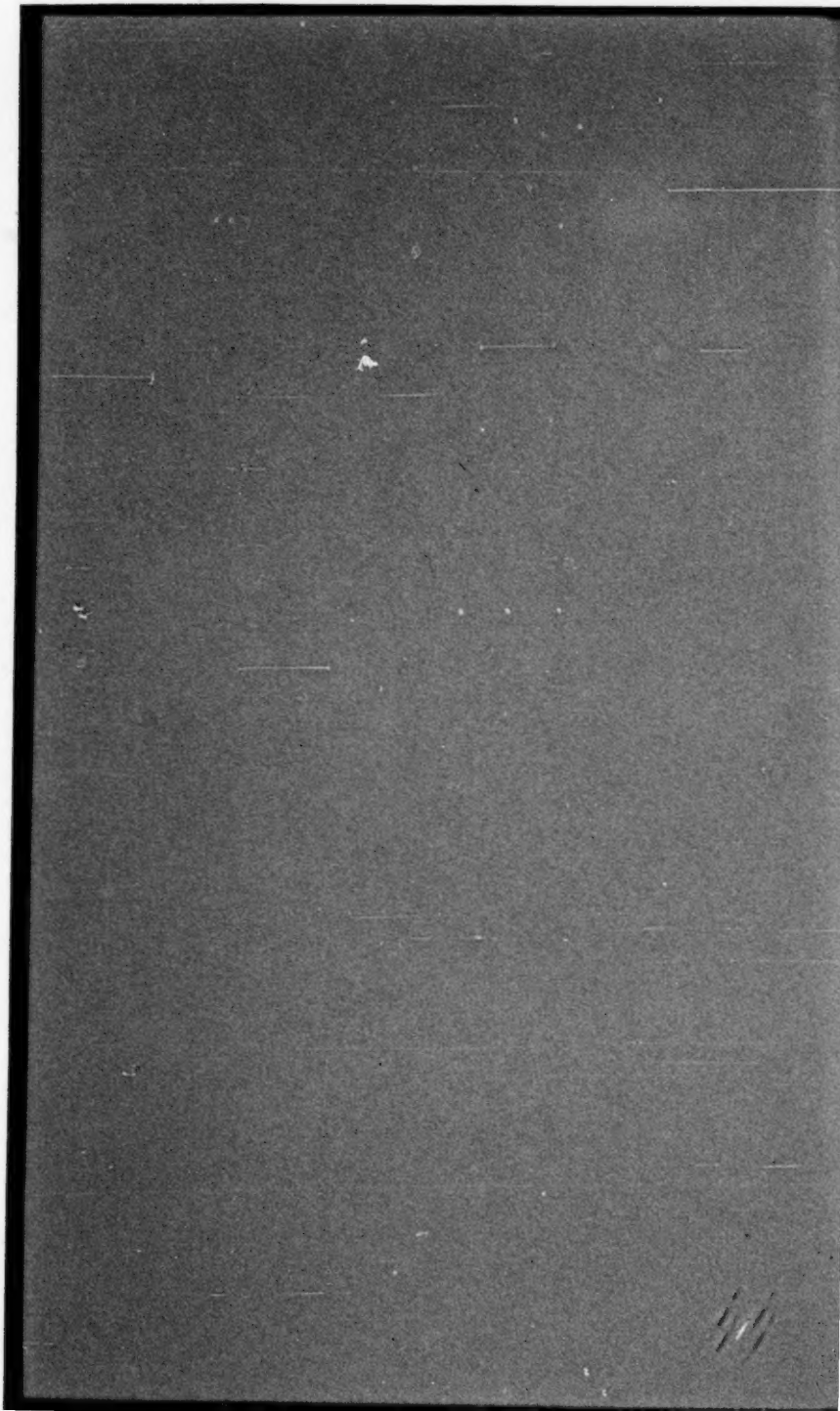
Emphasis supplied.

which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

Emphasis supplied.



SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	2
Counter-Statement of Questions Presented	2
Statutes Involved	2
Counter-Statement	2-5
Argument	5-10
I. This Court Has Previously Denied Four Similar Petitions	5-7
II. The Lower Courts Were Correct	7-9
III. There Is No Conflict Between Jurisdictions	9-10
IV. There Is No Important Federal Question	10
Conclusion	11
Appendix:	
I. Opinion of District Court	1a-17a
II. Statutes Involved	17a

INDEX TO AUTHORITIES CITED

Alabaugh v. B. & O. Railroad Co., 125 F. Supp. 401 (D. C. Md.)	8
Bohnen, et al. v. B. & O. C. T. R. Co., et al., 125 F. Supp. 463 (D. C., N. D. Ind.)	8

Page

Johns v. B. & O. R. Co., 118 F. Supp. 317 (D. C., Ill.), aff'd 347 U. S. 964 ..... 5, 8, 10

Lake et al. v. B. & O. Railway Co., 31 L. R. R. M. 2656 (U. S. D. C., S. D., W. Div., Ohio, Civil No. 3049), appeal dismissed by stip. 8

Norris-LaGuardia Act, 29 U. S. C. Secs. 101 and 108 2

Railway Labor Act:

45 U. S. C. Sec. 152, Eleventh 2, 3, 5, 7

45 U. S. C. Sec. 153, First (f) 9

45 U. S. C. Sec. 153, Second 4

Slocum v. D. L. & W. R. R. Co., 339 U. S. 239 (1950) 9

U. R. O. C., et al. v. New York, New Haven and Hartford Railroad Co., et al., 205 F. (2d) 153 (2nd Cir.), cert. den., U. S. S. Ct. 347 U. S. 929 8

U. R. O. C., et al. v. Northern Pacific Railway Co., et al., 208 F. (2d) 135 (9th Cir.), cert. den., U. S. S. Ct., 347 U. S. 929 ..... 6, 8

U. R. O. C., et al. v. Pennsylvania Railroad Co., 212 F. (2d) 938 (7th Cir.), cert. den. (before judgment), U. S. S. Ct., 347 U. S. 929 ..... 6, 8

U. R. O. C. v. Pennsylvania Railroad Co., 118 F. Supp. 317 8

U. R. O. C., et al. v. Wyer et al., 205 F. (2d) 153 (2nd Cir.), cert. den., U. S. S. Ct. 347 U. S. 920 ..... 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. .....

PAUL A. PIGOTT, EUGENE E. MURPHY, WILLIAM F. MENARD, FRANK R. McNABB, VINCENT W. BAUMIA, ERNEST E. LAMB, HAROLD HATCHER, JR., THOMAS R. HALL, PAUL EVANS, HENRY J. BARROW, and MILTON E. STONE,
Petitioners,

v.

DETROIT, TOLEDO & IRONTON RAILROAD, a Delaware Corporation, and BROTHERHOOD OF RAILROAD TRAINMEN

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the District Court is reported at 116 F. Supp. 949 (E. D. Mich.), and is reprinted at page 1a, *infra*. The opinion of the Court of Appeals for the Sixth Circuit and the dissenting opinion are reported at 221 F. (2d) 736 and at page 2a of the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Does a United States District Court have jurisdiction of the subject matter of a controversy respecting compliance by railroad employees with a union shop agreement executed pursuant to the provisions of the Railway Labor Act? (45 U. S. C. A. Sec. 152, Eleventh).

STATUTES INVOLVED

The pertinent statutory provisions (matters of emphasis aside) are set forth in petitioner's Appendix. Also pertinent are 29 U. S. C. Secs. 101 and 108 (Norris-LaGuardia Act), set forth, *infra*, page 17a.

COUNTER-STATEMENT

On May 26, 1952, following the enactment, on January 10, 1951, of the "Union Shop Amendment" to the Railway Labor Act (45 U. S. C. A. Sec. 152, Eleventh), Respondents Detroit, Toledo & Ironton Railway Company (D. T. & I.) and the Brotherhood of Railroad Trainmen (B. R. T.) entered into a union shop agreement, effective June 1, 1952, with respect to the crafts and classes of employees of the D. T. & I. (including Petitioners) for which the B. R. T. was the certified bargaining representative (R. 49a-53a). The agreement provided that such employees were required, as a condition of continued employment, to become and remain members of the B. R. T. "within sixty

(60) calendar days of the date they first perform compensated services as such employees after the effective date of this agreement * * *" (R. 49a). Moreover, in further conformity with subsection (c) of the union shop amendment to the Railway Labor Act, namely, Sec. 2, Eleventh (45 U. S. C. Sec. 152, Eleventh), the agreement further provided that the requirements of membership in the B. R. T. were not applicable to "employees * * * who maintained membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in engine, train, yard or hostling services * * *" (R. 49a).

On failure of the petitioners to thereafter pay membership dues to the B. R. T., the B. R. T. advised the company of that fact.

Subsequently, pursuant to the union shop agreement, a hearing was held before a System Board of Adjustment. Following hearing, the Board decided that the petitioners had not shown compliance with the union shop agreement in that (a) they acknowledged their voluntary non-membership in, and non-payment of dues to, the Respondent union, the certified bargaining agent, but (b) failed to present evidence establishing their membership in some other labor organization, "national in scope, and organized in accordance with the Railway Labor Act," whether United Railway Operating Crafts (of which organization the Petitioners were members) or any other organization, for that matter (R. 8a).

Following the ruling by the System Board, the petitioners commenced the instant action seeking, *inter alia*, injunctive relief against the discharge of the petitioners by the defendant railroad, and a ruling that they were in compliance with the agreement. The Respondent Brotherhood

moved to dismiss for reason of the Court's lack of jurisdiction over the subject matter.

The Brotherhood urged in its Motion to Dismiss that "the action involved is a dispute between the employees and the defendant carrier growing out of grievances or out of interpretation or application of an agreement concerning rules or working conditions, and respects the employment status of the said employees, the plaintiffs herein"; that, accordingly, "the dispute and parties are subject to the exclusive jurisdiction of the administrative tribunals provided by the Railway Labor Act, 45 U. S. C. A., Sec. 151 *et seq.*, as amended, which said Act is applicable to the within dispute and parties." It was urged accordingly that the decision of the System Board of Adjustment, convoked pursuant to Sec. 3, Second, of the Railway Labor Act (45 U. S. C. A. Sec. 153, Second) and the union shop agreement of the parties, was final and binding on the matters involved and that the "remedies accorded in the said Act [were] exclusive and the dispute, controversy and issues [t]herein concerned [were] non-justiciable." It was alleged, moreover, that "* * * the plaintiffs, before seeking injunctive relief, [had] not made every reasonable effort to settle the dispute, either through negotiations or the full utilization of administrative or extra-judicial remedies, inclusive of presentation to the Board of Adjustment of substantial proof of compliance with the terms of the union shop agreement, contrary to the requirements of Section 8 of the Norris-LaGuardia Act, 29 U. S. C. A., Sec. 108."

Thereafter, the District Court granted the Motion to Dismiss, as prayed (following the filing of an Amended Complaint by the Petitioners), and denied subsequent motion of the petitioners for reconsideration, or alternatively, amendment to raise, before a three-judge court, matters of

alleged unconstitutionality of Sec. 2, Eleventh, and the processes thereunder.[1] The Petitioners thereafter appealed to the Court of Appeals for the Sixth Circuit. Subsequent to certain proceedings in the Court of Appeals, including the denial by the Chief Judge of a temporary injunction pending appeal, and the vacation of a restraining order theretofore entered, the Petitioners filed a Petition for Certiorari, under Rule 39 of the U. S. Supreme Court, for review by this Court before decision of the Court of Appeals. That Petition was denied by this Court on the 12th day of April, 1954, 347 U. S. 944.

Thereafter, the Court of Appeals affirmed the decision of the District Court and subsequently denied a Motion for Rehearing filed by Petitioners. The present Petition was thereafter filed.

ARGUMENT

I.

THIS COURT HAS PREVIOUSLY DENIED FOUR SIMILAR PETITIONS

The present Petition is, at the least, the fifth Petition for Certiorari on the identical question, all of which have been presented to this Court by, what is in reality, the same petitioner, United Railway Operating Crafts (U. R. O. C.).

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[1] This Court later ruled in *Johns v. Baltimore & Ohio R. R. Co.*, 347 U. S. 964, that a complaint embodying the very allegations sought to be urged by these Petitioners did not in fact raise substantial constitutional questions, and accordingly affirmed dismissal of such complaint by a three-judge court.

Previous petitions, companion to the instant one, all considered and rejected by this Court, include the following:

United Railway Operating Crafts v. Wyer, Petition (to the Second Circuit) Number 472, October Term, 1953, cert. den., U. S. S. Ct., March 15, 1954, 347 U. S. 929.

United Railway Operating Crafts v. Northern Pacific Railroad, Petition (to the Ninth Circuit) Number 513, October Term, 1953, cert, den., U. S. S. Ct., March 15, 1954, 347 U. S. 929.

United Railway Operating Crafts v. Pennsylvania Railroad, Petition (to the Seventh Circuit) Number 548, October Term, 1953, cert. den., U. S. S. Ct., March 15, 1954, 347 U. S. 929. (Petition for certiorari before judgment, under Rule 39.)

Pigott, et al. v. D. T. & I. R. R. Co. (the instant case), Petition (to the Sixth Circuit) Number 607, October Term, 1953, cert. den., U. S. S. Ct., April 12, 1954, 347 U. S. 944. (Petition for Certiorari before Judgment Under Rule 39.)

The same considerations which influenced the denial of certiorari in each of the above matters are more than ever applicable in the case at bar. For even apart from considerations alleged by Petitioners to be peculiar to the case at bar which, if true, would preclude the general applicability of decision herein,[2] the fact remains that the denials of review by this Court in the various petitions above noted antedated the judgments in the Sixth and Seventh Circuits, which latter judgments re-emphasized the cor-

[2] Such allegations, of bias, have been consistently denied.

rectness and unanimity of earlier district court and appellate decisions.

II.

THE LOWER COURTS WERE CORRECT

There can be no question but that the decisions of the lower courts herein were correct on principle and precedent.

The present case is just one of many cases, including those already mentioned, involving substantially identical issues. Indeed, most of those cases, which followed the enactment of Section 2, Eleventh, were brought by the organization to which petitioners belong, U. R. O. C., or, as here, in its behalf.

In each of those cases, as here, the ultimate question of fact was whether the plaintiff employees were in compliance with the union shop agreement executed by the defendants. In each case the question was entrusted to an Adjustment Board, national or local. (In the instant case a System Board, convened under the authority of the agreement and of Section 3, Second, of the Railway Labor Acst, passed on the question and found adversely to the petitioners.) Here, as in other cases, there was no attack on the validity of the union shop agreement itself, except insofar as the forum for its application was in dispute (and constitutional issues not being before this Court in that connection, not having been timely brought before the District Court, as the Court of Appeals agreed—Petition, 10a), the ultimate question was accordingly one of interpretation of the agreement. This same question was before these other courts.

In every such case, except one, in which the issue was raised and in which decision was had, the respective district court and/or Court of Appeals, including those in the case at bar, ruled that they were without jurisdiction of the subject matter and that the controversy was properly and exclusively for the administrative agencies and procedures provided by the Railway Labor Act. *U. R. O. C., et al. v. Wyer, et al.*, 205 F. (2d) 153 (2nd Cir.), cert. den., U. S. S. Ct. 347 U. S. 920; *U. R. O. C., et al. v. New York, New Haven and Hartford Railroad Co., et al.*, 205 F. (2d) 153 (2nd Cir.), cert. den., U. S. S. Ct., 347 U. S. 929; *U. R. O. C., et al. v. Pennsylvania Railroad Company*, 212 F. (2d) 938 (7th Cir.), cert. den. (before Judgment), U. S. S. Ct., 347 U. S. 929; *U. R. O. C., et al. v. Northern Pacific Railway Co., et al.*, 208 F. (2d) 135 (9th Cir.), cert. den., U. S. S. Ct., 347 U. S. 929; *Lake et al. v. B. & O. Railway Co.*, 31 L. R. R. M. 2656 (U. S. D. C., S. D., W. Div., Ohio, Civil No. 3049), appeal dismissed by stip.; *Alabaugh v. B. & O. Railroad Co.*, 125 F. Supp. 401 (D. C., Md.); *Bohnen, et al. v. B. & O. C. T. R. Co., et al.*, 125 F. Supp. 463 (D. C., N. D. Ind.); *Johns v. B. & O. R. Co.*, 118 F. Supp. 317 (D. C., Ill.), aff'd 347 U. S. 964; and the instant case.

Indeed, in the exception noted, the District Court in question presumed to pass on the merits and found *adversely* to the contention that U. R. O. C. was national in scope.[3] However, on appeal, the Court of Appeals for the Seventh Circuit, in conformity with the similar rulings of the Second and Ninth Circuits, and, later of the Sixth, ruled that even though the parties *stipulated* to the district court's jurisdiction, the court was without jurisdiction on such matters as these.[4] Accordingly, all four Courts of Appeals which have passed on the jurisdictional question have unanimously agreed that the federal district courts are *without*

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[3] *U. R. O. C. v. Pennsylvania Railroad Company*, 118 F. Supp. 317.

[4] Same, 212 F. (2d) 938.

jurisdiction to pass upon the question here brought before the District Court.

In view of the numerous decisions in point unanimously holding against jurisdiction on the precise jurisdictional issue before this Court, several of which decisions this Court has previously refused to disturb, and in view, moreover, of the abundance of general judicial authority on the doctrine of exclusive administrative jurisdiction under the Railway Labor Act of questions arising thereunder, *Slocum v. D. L. & W. R. R. Co.*, 339 U. S. 239 (1950), there can be no question that the District Court in the instant case was without jurisdiction of the subject matter, as it and the Court of Appeals for the Sixth Circuit ruled.

III.

THERE IS NO CONFLICT BETWEEN JURISDICTIONS

As observed, the four Courts of Appeals which have passed upon the question at hand—the Second, Sixth, Seventh, and Ninth—have reached the unanimous conclusion of denying Federal court jurisdiction of the subject matter of these dispuets. They have unanimously agreed that questions of compliance by an employee with the terms of a union shop agreement involve matters of contract interpretation, which are committed to the exclusive jurisdiction of the National Railroad Adjustment Board (or, alternatively, to a System Board of alternative jurisdiction).[5]

This case is accordingly not one in which this Court ought to accept jurisdiction.

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[5] Petitioners allude to an alleged conflict between the Sixth and Seventh Circuits "in principle, though not in decision," by virtue of the references in the opinion of the Seventh Circuit to the significance of 45 U. S. C. A. 153, First (f). Similar references appear in the opinion of the Sixth Circuit, and conflict even in principle is accordingly illusory.

IV.

THERE IS NO IMPORTANT FEDERAL QUESTION

There is even less reason to entertain the petition at bar than those petitions previously denied by this Court.

The individuals *directly* involved are few; and if the Petitioners are held to their own arguments respecting facts allegedly peculiar to their own circumstances, no principle of general appplication can come out of review by this Court.

Moreover, and in any event, other arguments by Petitioners, if similarly taken at face value, seeking to draw distinctions between system boards and the National Board of Adjustment preclude any decision of general significance as to the latter (the Board before which most such matters as these will be heard).

Moreover, there are no constitutional issues of general import respecting the application of 2, Eleventh, before the Court. Not until after the decision by the District Court did the petitioners seek to amend their bill of complaint to allege the unconstitutionality of the statute in question with particular reference to the administrative procedures thereunder. Because of the tardiness in making such request (which request envisioned the convoking of a three-judge court) the District Court Judge denied such amendment and the Court of Appeals affirmed such denial as a proper exercise of discretion. Accordingly such constitutional issues are not before this Court for review and could not be the subject of decision by this Court.[*] Any decision, then, in the final analysis would be limited to narrow issues of less than national, constitutional concern.

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[*] In any event, as pointed out in footnote 1, supra, this Court, in *Johns v. Baltimore & Ohio Railroad Co.*, 347 U. S. 964, affirmed, in per curiam opinion, the decision of a three-judge court in that case, which had dismissed a complaint embodying the same allegations as petitioners sought here to make, as involving no substantial constitutional questions.

CONCLUSION

Wherefore, Respondent respectfully prays that the petition for certiorari be denied.

Dated: July 11, 1955.

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APPENDIX

INDEX

	Page
I. Opinion of District Court	1a-17a
II. Statutes Involved (Norris-LaGuardia Act)	17a

APPENDIX

I.

OPINION OF DISTRICT COURT

(116 F. Supp. 949)

This matter arises on a motion of the intervening defendant, the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood), to dismiss the complaint herein and the restraining order issued pursuant thereto.

The Brotherhood is the bargaining representative, as authorized by the Railway Labor Act, 45 U.S.C.A., §152, Fourth, of certain crafts and classes of the employees of the defendant, Detroit Toledo & Ironton Railroad Company (hereinafter referred to as the Railroad). The eleven plaintiffs, employees of the Railroad, belong to a rival union, United Railroad Operating Crafts (hereinafter referred to as U.R.O.C.).

Pursuant to §152, Eleventh of the Act,[1] the Brotherhood

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1. 45 U. S. C. A., § 152, Eleventh.

"Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to

and the Railroad entered into a union shop agreement requiring all employees of the crafts and classes represented by the Brotherhood to become members of the Brotherhood within sixty days after their employment or after the effective date of the agreement, whichever is later. The agreement excepts, as required by the statute, from the necessity of joining the Brotherhood those employees who belong to another labor organization which is national in scope and organized in accordance with the Act and which admits to membership employees of a craft or class in engine, train, yard, or hostling service, and also excepts certain other employees with whom we are not here concerned.

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tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of subsection (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds

It is not denied that the Brotherhood is the authorized bargaining agent for the crafts and classes to which the plaintiffs belong. However, relying upon the foregoing statutory exception, incorporated into the agreement between the Brotherhood and the Railroad, plaintiffs contend that U.R.O.C. is a labor organization, national in scope and organized in accordance with the Act,[2] and, as members of U.R.O.C., they are relieved of the necessity of joining the Brotherhood.

Upon the "initiative" of the Brotherhood, the matter of these eleven plaintiffs was scheduled for a hearing before a system adjustment board established by the union shop agreement to adjudicate disputes arising thereunder. This board was constituted of one representative of the Brotherhood and one representative of the Railroad. After the hearing, at which plaintiffs appeared, the board decided that U.R.O.C. was not a labor organization, national in scope and organized in accordance with the Act, and that the plaintiffs were not in compliance with the union shop agreement.

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membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any of such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. As amended Jan. 10, 1951, c. 1220, 64 Stat. 2138."

2. It is conceded that U.R.O.C. admits to membership employees of crafts or classes in engine, train, yard or hostling service, and that question is not in issue here.

To forestall their imminent discharge by the Railroad, the plaintiffs, on their own behalf and on behalf of all U.R.O.C. members similarly situated, commenced this action against the Railroad requesting, among other things, a declaratory judgment that U.R.O.C. is a labor organization, national in scope and organized in accordance with the Act; that the agreement entered into between the Railroad and Brotherhood is "unenforceable or inoperative" as to plaintiffs; that the determination of the system board ordering the discharge of the plaintiffs be declared to have been "irregular, arbitrary, against public policy, and its findings unenforceable"; and that the Railroad be permanently restrained from discharging plaintiffs. An order was granted restraining the Railroad from interfering with their employment status. It is this complaint and the restraining order which the Brotherhood now seeks to have dismissed on the ground that this Court is without jurisdiction.

The Railway Labor Act, an early example of legislation affecting employer-employee relations, was enacted in its present form in 1934. At that time it contained no provision for union shop agreements. In 1951 Congress adopted Section 152, Eleventh as an amendment to the Act authorizing the inclusion of a union shop requirement in a collective bargaining agreement. This section, however, excepts employees who belong to certain other unions from the necessity of joining the organization of the bargaining representative. To define when such alternative unions were so qualified that membership therein would except an employee from the union shop requirement, the drafters of this amendment incorporated into Section 152, Eleventh, the identical qualifications as had originally been set out in

Section 153, First, (a),[3] which section denotes which labor organizations are qualified to participate in the selection of labor representatives to the National Railroad Adjustment Board. In both sections, the labor organization must be national in scope and organized in accordance with the Act.

However, Section 152, Eleventh is silent as to the manner in which these qualifications are to be determined. On the other had, Section 153 establishes a specific administrative procedure for that purpose. There is a compelling inference that, when the identical qualifications of Section 153 were incorporated into Section 152, Eleventh, the drafters of this amendment also had the administrative procedure of Section 153 for determining these qualifications clearly in mind.

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3. 45 U. S. C. A., § 153, First.

"There is hereby established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate

This procedure (see footnote 3) requires that a labor organization desiring to participate in the selection of the labor representatives to the National Railroad Adjustment Board first apply to those labor organizations which are already participating and which select and prescribe the rules under which are selected the labor members on the National Railroad Adjustment Board.

It may be assumed that the natural hostility of these established unions towards a "new" union would create a bar towards the objective consideration of such applications, and Section 153, First, (f) provides that in the event of a dispute as to such right to participate, the matter can be referred to the Secretary of Labor for investigation of the claim of the "new" union to participate. If such claim has merit in the judgment of the Secretary of Labor, he then notifies the National Mediation Board and it arranges for a board of three to determine the right to participate.

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the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * * * *

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding."

This board consists of one member designated by the labor organizations already participating, one member by the labor organization seeking to participate, and a neutral member by the National Mediation Board. The findings of such a three-man board as to whether the petitioning union is national in scope and organized in accordance with the Act are "final and binding."

The establishment of this specific administrative procedure in Section 153 to determine the status of a labor organization is consistent with the general scheme of Congress in the Railway Labor Act that family quarrels shall be privately settled within the confines of the structure erected by the Act and as limited by the Act. For example, the National Railroad Adjustment Board, also provided for in Section 153 and consisting of eighteen carrier and eighteen labor members chosen by groups participating in the administration of the Act, is authorized[4] to hear disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.[5] The Act provides that the awards of the National Railroad Adjustment Board (and, by extension, of any system, group, or regional board) "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award,"[6] and it has been held that the courts do not have

4. 45 U. S. C. A., § 153, First (i).

5. In addition, Section 153, Second authorizes any individual carrier or group of carriers and any class or classes of its or their employees, pursuant to an agreement entered into between their bargaining representatives, to establish, in substitution for the national board, a system, group, or regional board of adjustment. Such a system, group, or regional board would have the same jurisdiction and the same authority over disputes as would the appropriate division of the National Railroad Adjustment Board.

6. 45 U. S. C. A., § 153, First (m).

jurisdiction over those disputes which Congress has committed to the exclusive jurisdiction of this agency.[7]

Similarly, the National Mediation Board, provided for in Section 154 and consisting of three public members appointed by the President, is authorized,[8] whenever a jurisdictional dispute arises between rival unions, to investigate such dispute and then to certify the union which is to act as bargaining representative for the employees in question. Such certificates are held to be exclusively within the competency of the National Mediation Board and its decisions are conclusive and not subject to review.[9]

In conformance with this settled pattern of the Railway Labor Act, the special administrative procedure of Section 153 must, therefore, be held to be vested with exclusive jurisdiction to determine whether a labor organization is national in scope and organized in accordance with the Act when a dispute arises pursuant to the right of the labor

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7. *Slocum v. Delaware, L. & W. R. Co.*, 339 U. S. 239 (dispute between two unions as to scope of respective agreements with same carrier); *Order of Railway Conductors of America v. Southern Railway Co.*, 339 U. S. 255 (dispute between employees and carrier as to interpretation of agreement); *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561 (dispute between two unions as to scope of respective agreements with carrier). In *Slocum* at p. 243 the Court says:

> "The Act thus represents a considered effort on the part of Congress to provide effective and desirable administrative remedies for adjustment of railroad-employee disputes growing out of the interpretation of existing agreements. The Adjustment Board is well equipped to exercise its congressionally imposed functions. Its members understand railroad problems and speak the railroad jargon. Long and varied experiences have added to the Board's initial qualifications. Precedents established by it, while not necessarily binding, provide opportunities for a desirable degree of uniformity in the interpretation of agreements throughout the nation's railway system."

8. 45 U. S. C. A., § 152, Ninth.

9. *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297; *General Committee v. M.-K.-T. R. Co.*, 320 U. S. 323. In the latter case at pp. 336-337 the Court says:

organization to participate in the National Railroad Adjustment Board machinery. The wisdom of Congress in utilizing such a special agency is illustrated by factors, some of which I here list for a better understanding of this legislation:

(a) Whether a labor organization is national in scope is not capable of precise definition. The history of the legislation, the peculiar characteristics of the type of labor organization concerned, the qualifications of other labor organizations already deemed to be qualified and the tensions existing as a result of inter-union rivalry must all be taken into consideration. It is the type of issue which those that are conversant with the specialized problems of the railroad industry are most capable of evaluating.

(b) A labor organization which is national in scope would be present in more than one jurisdiction and would have relationships with more than one carrier. If the question of its status were open to the courts, which are located in various areas of the nation, it is conceivable that such different jurisdictions would reach contrary conclusions if concurrent suits with separate carriers were to be litigated. During the delay while matters are being heard and pending the appellate resolution of possibly conflicting results, a serious element of doubt and confusion

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"However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive.

* * * * *

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied."

This result is reached even though Section 152, Ninth is silent as to whether such determinations are to be "final and binding."

would be injected into an industry whose uninterrupted operation is essential to the national welfare. The creation of a single, central, competent agency which is itself national in scope and is thus capable of dealing with these problems that touch every state of the union, obviates this risk and makes possible a more speedy determination.

(c) Because of the conflict of interests between the established unions and a "new" union, the National Railroad Adjustment Board is not a competent agency to review the qualifications of such a labor organization. With half of its members selected by the established unions, it is not likely that they would regard with equanimity the claim of a "new" union, a rival to one or more of the members' organizations.[10] This pressure to protect a vested interest would be even greater were the matter to be heard by a system board of the type before which the plaintiffs appeared in the instant case. That board, as has been stated, was made up of one representative of the Railroad and one representative of the Brotherhood. Furthermore, if each such system board had equal jurisdiction to adjudicate the status of a labor organization, there would be present the same threat of inconsistent results, with a labor organization being considered qualified as to certain carriers and not qualified as to others.

The foregoing considerations which prompted Congress to prescribe a separate administrative procedure rather than to rely upon an adjustment board or a judicial determination are equally applicable whether the dispute as to a labor organization's qualifications arises pursuant to its right to participate in the adjustment board machinery

10. See Comment, 18 University of Chicago Law Review 303, 1950, for an informative discussion on the manner in which representatives on the National Railroad Adjustment Board are motivated by partisanship.

or pursuant to its right to the union shop exception. Therefore, despite the absence of an express declaration in Section 152, Eleventh, as to how a labor organization's qualifications are to be determined for purposes of the exception to the union shop requirement, I must construe this section so as to make it consistent with the clearly articulated Congressional intention and policy in Section 153 to vest exclusive jurisdiction over such questions in this specific administrative procedure.

But, a labor orzanization cannot resort directly to this specific administrative machinery of Section 153 for the limited purpose of establishing that its members are entitled to the exception to the union shop requirement. The special agency provided in Section 153, First, (f), consisting of the Secretary of Labor and a three-man board, acquires jurisdiction only when a dispute arises with respect to the right of a labor organization to participate in the adjustment board machinery. To activate this administrative procedure a labor organization must first petition to participate in the selection of representatives to the adjustment board. In the event that this petition is rejected, it can then take its case to the Secretary of Labor and the three-man board. The necessary effect of these provisions is that a labor organization, desirous of qualifying for the exception to the union shop requirement, must also participate in the adjustment board machinery before it can obtain the required stamp of approval from the specific administrative procedure provided in Section 153. Only in this way is the Congressional intention to provide a special administrative determination of these qualifications reconciled with the provisions regulating access to this administrative procedure.

This result is consonant with the intention of the drafters of the union shop amendment that a labor organiza-

tion shall not be entitled to enlist employees on the basis of the privileged standing accorded to qualified unions in Section 152, Eleventh, until it has assumed its fair share of the burdens and responsibilities attendant upon the administration of the Act.[11] Thus, a labor organization must exert itself, at least to the extent of participation in the adjustment board machinery, before it is so entitled. It is only by insisting on present participation that a clear and concrete standard is available to guide all interested parties as to the status of a labor organization. With the benefit of such a standard, no employee need risk his seniority or his job by having to join a labor organization first and then to wait for an adjustment board or court proceeding before the status of such rival labor organization is adjudicated. The evil in such a practice is that the employee will be discharged for having failed to join the organization of the bargaining representative if it is finally determined that the rival union is not qualified. In the instant case, the plaintiffs should either have insisted that U. R. O. C. establish its status in the prescribed fashion or have protected their interests by joining the Brotherhood.

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11. Each union participating in the agencies of the Act must itself pay for the salaries and expenses of its officials who serve in such agencies. This constitutes a considerable financial burden which must be reflected in the dues charged the employees. Unless a labor organization were obliged to participate in the adjustment board machinery before it could qualify for the union shop exception, it would place the bargaining representatives in an unfair competitive position with respect to a rival union. Employees would be tempted to desert the organization of a bargaining representative which was assuming its responsibilities under the Act in favor of another union which was not contributing to its operation and which could thereby offer cheaper dues. This would defeat the very purpose of the union shop amendment which is to compel each employee to contribute his part to the bargaining representative's activities on his behalf, including its participation in the administrative machinery of the Act. See Testimony of George M. Harrison, representative of the Railway Labor Executives Association in Hearings on Senate Bill 3295, pp. 15 and 16 (May 1950) before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Congress, 2d Sess.

Not only do I find that this Court is without jurisdiction to decide whether U. R. O. C. is national in scope and organized in accordance with the Act, but I also hold that there is an absence of jurisdiction to decide whether the agreement between the Brotherhood and the Railroad is "unenforceable or inoperative" as to the plaintiffs. Although Congress has removed certain matters regarding the status of a labor organization from the cognizance of the adjustment boards, they still retain exclusive jurisdiction over the interpretation and application of agreements concerning rates of pay, rules or working conditions. The union shop provision of an agreement, executed in conformance with the Act, concerns a rule of working condition governing the employment relationship, and a dispute as to whether an employee should be discharged for failure to comply with such a provision of the agreement is a dispute between an employee and a carrier involving the interpretation and application of an agreement concerning a rule or working condition. The hearing of such a dispute, therefore, is within the exclusive province of the adjustment board.

To be sure, in deciding whether the labor organization to which the noncomplying employee belongs is national in scope and organized in accordance with the Act, the adjustment board must abide by the determination of such status made through the administrative procedure of Section 153. Because U. R. O. C. was not then participating in the National Railroad Adjustment Board machinery, there was no alternative but for the system board to find that U. R. O. C. was not national in scope and was not organized in accordance with the Act.

Since the agreement between the Brotherhood and the Railroad does not purport to confer greater authority upon the system board than authorized by the Act, I am without

power to supplant the adjustment board or to review its determinations in these premises. Section 153 (m), expressly makes "final and binding" determinations which do not involve a money award. That Congress intended by this declaration to remove from this Court any power under its general grants of jurisdiction to hear such matters is confirmed by Section 153 (p).[12] In this section Congress goes on to declare that a District Court of the United States will have special jurisdiction to review such determinations of the Adjustment Board when the matter arises on a petition to enforce an order of the board.

Reading this latter special grant of jurisdiction in the light of the provision making the determinations of the Adjustment Board "final and binding," the conclusion is inescapable that this Court is authorized to review Adjustment Board determinations only under the circumstances and in accordance with the procedures outlined in Section

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12. 45 U. S. C., § 153 (p).

"If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition seting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the procedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

153 (p).[13] The unique character of these boards, in which the adverse parties are equally represented, gives their proceedings more of the quality of a conciliation conference than a quasi-judicial tribunal. For this reason, they are intended to be self-regulating both as to substantive and procedural matters. This informal technique of resolving employer-employee conflicts which Congress has provided for the Railroad industry offers no basis for the application of principles of judicial review.

It is urged upon the Court that there is authority in *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192, for disqualifying the system board and for the assumption of jurisdiction by this Court to protect the alleged invasion of plaintiffs' statutory and constitutional rights. In *Steele* the petitioners were Negroes who were protesting against discriminatory treatment at the hands of the bargaining representative, and the delegates of this same bargaining representative were sitting on the adjustment board and would pass on the merits of the complaint. There is language in that case to the effect that a hearing before an adjustment board under such circumstances is not an adequate administrative remedy because of the conflict of interest between the labor organization and the employees whom it represents.

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13. See *Missouri-Kansas-Texas R. Co. v. Brotherhood of Ry. & S. S. Clerks*, 188 F. 2d 302, 305:

> "Both appellants contend that since § 3, First (p) of the Railway Labor Act, 45 U. S. C. A. § 153, subd. 1 (p), makes special provision for judicial review of awards of the Board, jurisdiction over such reviews is vested only in the courts therein specified and must be exercised in accordance with the procedures therein provided.
>
> "There is no question now but that the courts have absolutely no jurisdiction to interrupt agreements between carriers and their employees or to settle disputes arising out of the construction of such agreements. That principle has been so firmly established by a series of decisions construing § 3 of the Railway Labor Act that we deem it unnecessary even to cite authorities."

In support of this contention that the system board should be disqualified because of a like conflict of interest between the Brotherhood and the plaintiffs, plaintiffs also request that I find that the hearings before the system board were "irregular, arbitrary, against public policy, and its findings unenforceable."

Before the plaintiffs would have standing to request a declaration that the system board is disqualified in this matter, their complaint must allege a controversy, ripe for adjudication, in which it appears that such a holding is indispensable to the protection of their legal rights. Under the Act, plaintiffs are not entitled to their seniority or their employment unless they belong either to the Brotherhood or to another union which has qualified, pursuant to the procedure provided in Section 153, for the exception to the union shop requirement. Since the complaint fails to allege that U.R.O.C. has so qualified, plaintiffs' membership in that labor organization does not preserve any right, the protection of which justifies the intervention of this Court.[14]

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14. Cf. *Order of Railway Conductors of America v. Pitney*, 326 U. S. 561, 567:

> "The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then * * *. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time O.R.C. cannot show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand."

An order dismissing the complaint and vacating the temporary restraining order will be entered.

THEODORE LEVIN,
United States District Judge.

Dated: Detroit, Michigan
November 10, 1953.

II.

STATUTES INVOLVED

(Norris-LaGuardia Act)

29 U. S. C. A., Sec. 101. No court of the United States, as defined in sections 101-115 of this title, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of such sections; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in such sections.

29 U. S. C. A. Sec. 108. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.